

FILED 27 FEB '17 11:07 USDC-ORP

JUSTIN JAMES ENGLE
Name

12240550
Prisoner Identification Number

OREGON STATE PENITENTIARY
Place of Confinement

2605 STATE ST. SALEM, OR. 97310
Address

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

JUSTIN JAMES ENGLE
PETITIONER,

v.

Civil Case No. 6:17-CV-323-JR

SUPERINTENDENT KELLY
O.S.P.

(Name of Warden, Superintendent, Jailor,
Parole or Probation Supervisor, or authorized
person having custody of petitioner.)

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254

RESPONDENT(S).

CONVICTION UNDER ATTACK

1. Name and location of court which entered the judgment of conviction under attack:

JACKSON COUNTY CIRCUIT COURT 100 S. OAKDALE, MEDFORD, OR. 97501

2. Criminal docket or case number (if you know): 115573 FE / COUNT # 12

3. Date of judgment of conviction: 11 / 16 / 2012

4. Length of sentence: 70 MONTHS

Revised April 24, 2008

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PETITION FOR WRIT OF HABEAS CORPUS
Pursuant to 28 U.S.C. § 2254
USDC-OREGON

5. Nature of offense involved (all counts):

THERE ARE SEVERAL COUNTS ON THE CHARGING INSTRUMENT, INDICTMENT, AND JUDGMENT. THE ONLY COUNT IN THIS PARTICULAR CASE BEING CHALLENGED IS AS FOLLOWS:
COUNT # 12 ASSAULT II, MEASURE 11

6. What was your plea? (Check one)

☒ Not Guilty

☐ Guilty

☐ Nolo Contendere

☐ Insanity plea

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

7. If you pleaded not guilty, what kind of trial did you have? (Check One)

☒ Jury

☐ Judge Only

8. Did you testify at trial?

☐ Yes

☒ No

EXHAUSTION OF STATE REMEDIES

DIRECT APPEAL

9. Did you directly appeal from the judgment of conviction?

☒ Yes

☐ No

10. If you did appeal, answer the following:

- a. Name of court: OREGON DISTRICT COURT OF APPEALS
b. Docket or case number (if you know): A-153188 / 115573 FE
c. Result: JUDGMENT AFFIRMED

d. Date of result and citation, if known: 5-4-16

e. Grounds raised:

CHALLENGED ADMISSION OF IMPROPERLY SUGGESTIVE IDENTIFICATION OF DEFENDANT AS PERPETRATOR OF THE ASSAULT IN THE SECOND DEGREE CHARGED IN COUNT # 12. THE EYEWITNESS WAS UNABLE TO IDENTIFY THE DEFENDANT IN TRIAL, AND ONLY DID AFTER BEING SHOWN A SINGLE PHOTOGRAPH OF DEFENDANT IN JAIL GARB. WITNESS ADMITS TO MENTAL DISABILITIES AS WELL.

11. Did you seek further review of the decision on appeal by a higher state court?

☒ Yes

☐ No

a. Name of court: OREGON SUPREME COURT

b. Docket or case number (if you know): N006165 / CA A153188

c. Result: REVIEW DENIED

d. Date of result and citation, if known: 10 / 20 / 16

e. Grounds raised:

WHETHER COA MUST REMAND A CASE WHEN THE UNDERLYING LAW, CONTROLLING THE ISSUE ON APPEAL CHANGED BETWEEN THE DECISIONS OF THE TRIAL COURT AND THE COA AND, IF NOT, WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT THE IN-COURT WITNESS IDENTIFICATION WAS ADMISSIBLE.

12. Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes

☒ No

a. Result: _____

b. Docket or case number (if known): _____

c. Date of result and citation, if known: _____

d. Grounds raised:

13. If you did not directly appeal from the judgment of conviction, explain briefly why you did not:

POST-CONVICTION RELIEF

14. Did you file a petition for state post-conviction relief or state petition for writ of habeas corpus?

☐ Yes

☒ No

a. Name of court: _____

b. Docket or case number (if known): _____

c. Nature of proceeding: _____

d. Did you receive an evidentiary hearing?

☐ Yes

☒ No

e. Result: _____

f. Date of result and citation or case number, if known: _____

g. Grounds raised:

15. Did you appeal the result of your state post-conviction or state habeas corpus proceeding?

☐ Yes

☒ No

a. Name of court: _____

b. Docket or case number, if known: _____

c. Result: _____

d. Date of result and citation, if known: _____

e. Grounds raised:

16. Did you seek further review of the decision on appeal by a higher state court?

☐ Yes

☒ No

a. Name of court: _____

b. Docket or case number, if known: _____

c. Result: _____

d. Date of result and citation, if known: _____

e. Grounds raised:

17. If you did not appeal from the adverse decision in your state post-conviction or state habeas corpus proceeding, explain briefly why you did not:

I WILL FILE POST CONVICTION AT A
LATER DATE ACCORDING TO STATUTE.

GROUND FOR RELIEF

18. For this petition, state *concisely* every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. Attach additional pages if you have more than four grounds.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust (use up) your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may

raise any grounds which you may have other than those listed if you have exhausted your state remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

- a. Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- b. Conviction obtained by use of coerced confession.
- c. Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- d. Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- e. Conviction obtained by a violation of the privilege against self-incrimination.
- f. Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- g. Conviction obtained by a violation of the protection against double jeopardy.
- h. Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- i. Denial of effective assistance of counsel.
- j. Denial of right of appeal.

A. Ground One:

THE STATES ONLY EYEWITNESS UNABLE TO IDENTIFY DEFENDANT, AND ONLY AFTER BEING SHOWN A SINGLE PHOTO OF DEFENDANT (IN TRIAL) NO LINE UP, WAS THE EYEWITNESS ABLE TO IDENTIFY. CHALLENGE THAT THIS QUESTIONABLE IDENTIFICATION WAS INDEED NOT HARMLESS

Supporting FACTS (state briefly without citing cases or law):

AS A MATTER OF THE TRIAL RECORD - THE WITNESSES OWN TESTIMONY AND WAS ALSO RAISED AND CHALLENGED ON DIRECT APPEAL. ALSO RAISED IN PETITION TO REVIEW. THE NAME JUSTIN WAS ALSO PROVIDED TO THE WITNESS BY HER CASE WORKER. THE WITNESS ALSO "LOCKED" AROUND THE COURTROOM AND STATED SHE DID NOT SEE THE DEFENDANT. ALSO THE PHOTO PROVIDED DISPLAYED THE DEFENDANT IN JAIL CLOTHES.

B. Ground Two:

CHALLENGE THE EYEWITNESSES' MENTAL CAPACITY, AND WHY WASN'T THIS CHALLENGED IN TRIAL. PROFESSIONAL EVALUATION.

Supporting FACTS (state briefly without citing cases or law):

ON RECORD AND EYEWITNESSES OWN TESTIMONY. SHE TESTIFIED THAT SHE HAS SCHIZOPHRENIA, TAKES MEDICATION AND LIVES IN A GROUP HOME AND HAS A CASEWORKER. DEFENSE ALSO ELICITED FROM THE WITNESS THAT ASIDE FROM OTHER THINGS SHE WAS ALSO USING METHAMPHETAMINES WHEN SHE OBSERVED THE CHARGED ASSAULT. THIS WITNESS DID NOT OBSERVE AN ASSAULT.

C. Ground Three:

ADMITTING THE PHOTOGRAPH INTO EVIDENCE IN VIOLATION OF THE PROHIBITION AGAINST IMPROPERLY SUGGESTIVE IDENTIFICATIONS. AND WHY IT WASNT DISCUSSED IF WITNESS "KNEW" HE WAS IN JAIL ATTIRE

A SMALL PORTION OF THE COLLAR OF DEFENDANTS JAIL ISSUED SHIRT AND JAIL ISSUED SWEATSHIRT WERE VISIBLE IN THE PHOTOGRAPH. DID THE WITNESS KNOW THAT THIS WAS JAIL ATTIRE?

D. Ground Four:

THAT THE TESTIMONY OF KRISTINE FAIR WAS NOT HARMLESS IN THE JURIES VERDICT OF GUILTY ON COUNT # 12 ASSAULT II

Supporting FACTS (state briefly without citing cases or law):

AFTER WITNESS TESTIFIES TO THE COURTS QUESTION: "SO WHAT MAKES YOU ABLE TO RECOGNIZE THEM NOW" THE WITNESS RESPONDS "BECAUSE I REMEMBER"

THE COURT EVEN ADMITS ON RECORD THAT "IT DOES GO TO WEIGHT" THEREFORE BECOMING NOT HARMLESS.

OTHER INFORMATION

19. Please answer these additional questions about the petition you are filing:

- a. Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

☐ Yes

☒ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

B. MENTAL CAPACITY WAS NOT PRESERVED.

C. WASNT DISCUSSED IF WITNESS KNEW HE WAS IN JAIL ATTIRE - NOT HARMLESS - NOT PRESERVED.

D. THAT KRISTINE FAIR'S TESTIMONY WAS NOT HARMLESS

- b. Is there any ground in this petition that has not been presented in some state or federal court? If so, identify which ground or grounds have not been presented, and state your reasons for not presenting them:

DEC 403

SAME AS A.
AND IMMEASE WEIGHT WAS IN HANDS OF
APPELATE ATTORNEY. KRISTINE FAIR'S MENTAL
CAPACITY HAVING SCHIZOPHRENIA LEADS ONE TO
QUESTION, WHICH KRISTINE FAIR APPEARED IN TRIAL THAT DAY.

20. Do you have any petition or appeal now pending (filed and not decided yet) in any court, state or federal, for the judgment you are challenging here?

☐ Yes

☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised:

21. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

- a. At preliminary hearing:

ALYSSA BARTHOLOMEW OSB # 051649
604 WEST MAIN ST. MEDFORD, OR 97501

- b. At arraignment and plea:

SAME AS ABOVE

- c. At trial:

ALYSSA BARTHOLOMEW 604 W. MAIN MEDFORD, OR. 97501
MICHAEL BERTHOLF O.S.B. # 044642

- d. At sentencing:

ALYSSA BARTHOLOMEW
MICHAEL BERTHOLF

- e. On appeal:

1st ROBIN TONES 1175 COURT ST NE, SALEM, OR 97301-4030
THEN, MARC D. BROWN #030825 SAME ADDRESS AS
ABOVE.

- f. In any post-conviction proceeding:

NONE

g. On appeal from any adverse ruling in a post-conviction proceeding:

NONE

22. Is this the first federal petition for writ of habeas corpus challenging this conviction?

☒ Yes

☐ No

a. If no, in what court was the prior action filed? _____

b. What was the prior case number? _____

c. Was the prior action: ☐ Decided on the merits, or
☐ Dismissed on procedural grounds

d. Date of decision: _____

e. Are there any issues in this petition raised in the prior petition?

☒ Yes

☐ No

f. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition?

☐ Yes**

☐ No

**If the answer is "yes," you must attach a copy of the order received from the Ninth Circuit Court of Appeals.

23. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes

☒ No

a. If so, give the name and location of the court which imposed the sentence to be served in the future: _____

b. Give the date and length of sentence to be served in the future: _____

c. Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

☐ Yes

☒ No

24. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition:

THE DIRECT APPEAL AND REVIEW OF
DECISION DENIAL TOOK WELL OVER 1 YEAR.
THIS WRIT IS BEING SUBMITTED WITHIN THE
1 YEAR STATUTE FROM THE FINAL DENIAL
DATE BY THE OREGON SUPREME COURT OF 10-20-2016

25. Date you are mailing (or handing to correctional officer for mailing) this petition to the court:

1-13-17

WHEREFORE, petitioner prays that the court will grant such relief to which he or she may be entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in a state custody.

Signature of Attorney (if any)

DECLARATION UNDER PENALTY OF PERJURY

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

1-13-17
Date

Justin Engle
Signature of Petitioner